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Rames a/l Arumugam v Public Prosecutor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(M)-572–12 OF 2019 AND B-05(M)-575–12 OF 2019
KAMALUDIN MD SAID, NORDIN HASSAN AND HASHIM HAMZAH JJCA
11 MAY 2023

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants convicted for offence of murder under s 302 of Penal Code read together with s 34 of Penal Code — Whether trial judge failed to consider material discrepancies in evidence of witnesses — Whether witnesses credible — Whether trial judge ought to invoke adverse inference under s 114(g) of Evidence Act 1950 due to failure of prosecution to call witnesses — Whether circumstantial evidence lead to irresistible conclusion of appellants' guilt — Whether common intention proven — Evidence Act 1950 s 114(g) — Penal Code ss 34 & 302

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The appellants were charged under s 302 of the Penal Code ('the PC') read together with s 34 of the PC for the murder of the deceased. The prosecution's case was based on the evidence of SP6 and SP12 who testified that the appellants had attacked the deceased with a machete and a knife and chased after the deceased who ran into a palm oil plantation. The deceased was found dead the following day and the pathologist ('SP15') had confirmed that the

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cause of death was a stab wound to the heart. In defence, both the appellants provided different versions whereby the first appellant contended that the second appellant who had slashed the deceased prior to the deceased's escape to the palm oil plantation whereas the second appellant contended that the first appellant was the one who had slashed the deceased. At the end of the trial, the

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learned judicial commissioner ('the JC') found that the appellants had failed to raise reasonable doubt to the prosecution's case and that the prosecution had proven its case beyond reasonable doubt. Thus, the appellants were convicted and sentenced to death. Dissatisfied with the decision, the appellants filed the present appeals wherein the appellants raised the issues of whether the learned

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JC had erred in fact and law when he failed: (a) to consider that there were material discrepancies in the evidence of SP6 and SP12, which undermined their credibility — in this regard, the appellants contended that SP6 stated that it was the second appellant who had slashed the deceased on his back whereas SP12 testified that the first appellant was the one who had slashed the deceased;

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(b) to draw an adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for failing to call Chi Chi and Murugan/Omar (who were also at the scene where the deceased was attacked) to give evidence; (c) to consider that the investigation conducted by the investigating officer was shoddy and that the circumstantial evidence adduced in its totality did not lead

to the only irresistible conclusion of the appellants' guilt — in relation to this argument, the appellants contended that the murder weapon was never recovered by the police; and (d) there was no evidence of common intention between the appellants to murder the deceased.

Held, dismissing the appeals, and affirming the decision of the learned JC:

(1) The learned JC was well aware of the discrepancies in the evidence of SP6 and SP12. Yet, for the reasons as provided by the learned JC, he found that the discrepancies were not material and that SP6 and SP12 were truthful witnesses. The learned JC had also accepted the crucial part of their evidence which was consistent and remained unchallenged ie, that the deceased was confronted by the appellants and as a result of their actions, the deceased tried to save himself by running into the plantation while the appellants gave chase. The credibility of SP6's and SP12's evidence was decided wholly on the facts and the prevailing circumstances of the case by the learned JC, who had the audio-visual advantage reserved for the trial court. The court had no reason to disagree with the learned JC's findings on SP6 and SP12's credibility. The court also had no reason to disturb the findings of fact arrived by the learned JC that the discrepancies in their evidence were not material and were insufficient to affect their credibility (see paras 39–40 & 42).

(2) The court agreed with the learned JC that Chi Chi and Murugan/Omar were not essential or material witnesses for the prosecution to establish their case against the appellants. The prosecution had already called two eyewitnesses who had testified on what have transpired on the night in question. SP6 was the nearest person to the deceased, and SP12 was standing outside his relative's house next to the deceased's house. As such, the non-calling of Chi Chi and Murugan/Omar did not leave any gap in the prosecution's case. There was also no evidence to suggest that the prosecution had suppressed or withheld Chi Chi's and Murugan/Omar's evidence from the defence. Therefore, adverse inference under s 114(g) of the Evidence Act 1950 should not be drawn against the prosecution (see paras 47–48).

(3) It was pertinent to note that the prosecution's case was substantially based on circumstantial evidence. No eyewitnesses saw who inflicted the fatal injury to the deceased, leading to his death. In the present case, SP6 and SP12 confirmed that the appellants used sharp weapons, such as a machete or knife, when they attacked the deceased from behind. This was consistent with the marks of injury noted by SP15 when he conducted the post mortem on the deceased's body. The appellants were also seen to have pursued the deceased into the plantation while still holding the weapon. Therefore, the court disagreed with the appellants that the non-recovery of the murder weapon had any effect on the prosecution's

A case. The court found that all the circumstantial evidence adduced by the prosecution pointed to the irresistible conclusion that the appellants were the ones who had inflicted the fatal injury to the deceased, causing his death. Based on the evidence, the court did not see any other possible explanation other than the appellants' guilt (see paras 49, 56–57 & 59).

B (4) It could also be inferred from the circumstances of the case and the conduct of the appellants that the criminal act of murder was done in furtherance of their common intention, regardless of who amongst the first or second appellant had delivered the fatal injury to the deceased. C Therefore, liability for the crime may be imposed on any one of the appellants in the same manner as if the act were done by him alone. In totality, the court found that the learned JC did not commit any misdirection in his decision and had not erred in fact and in law in arriving at the said decision, as such, the conviction was safe (see paras 60 D & 63).

[Bahasa Malaysia summary

Perayu-perayu didakwa di bawah s 302 Kanun Keseksaan ('KK') dibaca bersama s 34 KK kerana membunuh si mati. Kes pendakwaan adalah E berdasarkan keterangan SP6 dan SP12 yang memberi keterangan bahawa perayu telah menyerang si mati dengan parang dan pisau dan mengejar si mati yang telah lari memasuki ke ladang kelapa sawit. Si mati ditemui mati pada keesokan harinya dan pakar patologi ('SP15') telah mengesahkan bahawa punca kematian adalah luka tikaman di jantung. Dalam pembelaan, F kedua-dua perayu memberikan versi yang berbeza di mana perayu pertama berhujah bahawa perayu kedua yang telah menetak si mati sebelum si mati melarikan diri ke ladang kelapa sawit tersebut manakala perayu kedua menyatakan bahawa perayu pertamalah yang telah menetak si mati. Pada akhir perbicaraan, pesuruhjaya kehakiman yang bijaksana ('PK') mendapati bahawa G perayu-parayu telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Justeru, perayu-perayu telah disabitkan bersalah dan dijatuhkan hukuman mati. Tidak berpuas hati dengan keputusan tersebut, perayu-perayu memfailkan rayuan semasa di mana perayu-perayu H membangkitkan isu-isu sama ada PK yang bijaksana telah terkhilaf dalam fakta dan undang-undang apabila beliau gagal: (a) untuk mempertimbangkan bahawa terdapat percanggahan material dalam keterangan SP6 dan SP12, yang menjejaskan kredibiliti mereka — dalam hal ini, perayu-perayu berhujah bahawa SP6 menyatakan bahawa perayu kedua yang telah menetak si mati di I belakangnya manakala SP12 memberi keterangan bahawa perayu pertama yang telah menetak si mati; (b) untuk membuat anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan kerana gagal memanggil Chi Chi dan Murugan/Omar (yang turut berada di tempat kejadian di mana si mati diserang) untuk memberikan keterangan; (c) untuk

menimbangkan bahawa penyiasatan yang dijalankan oleh pegawai penyiasat adalah tidak lengkap dan bahawa keterangan mengikut keadaan yang dikemukakan secara keseluruhannya tidak membawa kepada satu-satunya kesimpulan yang tidak dapat ditolak tentang kebersalahan perayu-perayu — berhubung dengan hujah ini, perayu-perayu berhujah bahawa senjata pembunuhan tidak pernah ditemui oleh polis; dan (d) tiada keterangan menunjukkan niat bersama antara perayu-perayu untuk membunuh si mati.

Diputuskan, menolak rayuan perayu-perayu dan mengekalkan keputusan PK yang bijaksana:

(1) Pesuruhjaya kehakiman yang bijaksana amat menyedari tentang percanggahan keterangan SP6 dan SP12. Namun, atas alasan-alasan yang diberikan oleh PK yang bijaksana, beliau mendapati percanggahan tersebut tidak ketara dan SP6 dan SP12 adalah saksi-saksi yang benar. Pesuruhjaya kehakiman yang bijaksana juga telah menerima bahagian penting keterangan mereka yang konsisten dan kekal tidak dicabar iaitu perayu-perayu telah berjumpa dengan si mati dan akibat daripada tindakan mereka, si mati cuba menyelamatkan diri dengan berlari ke ladang tersebut sambil dikejar oleh perayu-perayu. Kredibiliti keterangan SP6 dan SP12 telah diputuskan sepenuhnya berdasarkan fakta dan keadaan semasa kes oleh PK yang bijaksana, yang mempunyai kelebihan audio-visual dikhaskan untuk mahkamah perbicaraan. Mahkamah tidak mempunyai sebab untuk tidak bersetuju dengan penemuan PK yang bijaksana mengenai kredibiliti SP6 dan SP12. Mahkamah juga tidak mempunyai sebab untuk mengganggu penemuan fakta yang dibuat oleh PK yang bijaksana bahawa percanggahan dalam keterangan mereka adalah tidak material dan tidak mencukupi untuk menjejaskan kredibiliti mereka (lihat perenggan 39–40 & 42).

(2) Mahkamah bersetuju dengan PK yang bijaksana bahawa Chi Chi dan Murugan/Omar bukanlah saksi-saksi penting atau material bagi pihak pendakwaan untuk membuktikan kes mereka terhadap perayu-perayu. Pihak pendakwaan sudah memanggil dua saksi untuk memberi keterangan mengenai apa yang berlaku pada malam hari kejadian. SP6 adalah orang terdekat dengan si mati, dan SP12 berdiri di luar rumah saudaranya bersebelahan rumah si mati. Oleh itu, kegagalan memanggil Chi Chi dan Murugan/Omar tidak meninggalkan apa-apa kelompangan dalam kes pendakwaan. Juga tiada keterangan yang menunjukkan bahawa pihak pendakwaan telah menyekat atau menahan keterangan Chi Chi dan Murugan/Omar daripada pihak pembelaan. Oleh itu, anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 tidak seharusnya dibuat terhadap pihak pendakwaan (lihat perenggan 47–48).

(3) Adalah penting untuk mengambil perhatian bahawa kes pendakwaan adalah berdasarkan keterangan mengikut keadaan. Tiada saksi yang

melihat siapa yang menyebabkan kecederaan maut kepada si mati sehingga menyebabkan kematiannya. Dalam kes ini, SP6 dan SP12 mengesahkan bahawa perayu-perayu menggunakan senjata tajam, seperti parang atau pisau, apabila mereka menyerang si mati dari belakang. Ini selaras dengan tanda kecederaan yang dicatatkan oleh SP15 semasa beliau menjalankan bedah siasat ke atas mayat si mati. Perayu-perayu juga dilihat telah mengejar si mati ke dalam ladang tersebut sambil masih memegang senjata. Oleh itu, mahkamah tidak bersetuju dengan perayu-perayu bahawa ketiadaan senjata pembunuhan tersebut mempunyai kesan ke atas kes pendakwaan. Mahkamah mendapati bahawa semua keterangan mengikut keadaan yang dikemukakan oleh pihak pendakwaan menunjukkan kesimpulan yang tidak dapat dinafikan bahawa perayu-perayu adalah mereka yang telah menyebabkan kecederaan maut kepada si mati yang menyebabkan kematiannya. Berdasarkan keterangan, mahkamah tidak melihat apa-apa penjelasan lain yang mungkin selain daripada kebersalahan perayu-perayu (lihat perenggan 49, 56–57 & 59).

(4) Ia juga boleh disimpulkan daripada keadaan kes dan kelakuan perayu-perayu bahawa perbuatan jenayah pembunuhan tersebut dilakukan untuk meneruskan niat bersama mereka, tanpa mengira siapa di antara perayu pertama atau kedua telah menyebabkan kecederaan maut ke atas si mati. Oleh itu, liabiliti untuk jenayah tersebut boleh dikenakan ke atas mana-mana seorang perayu dengan cara yang sama seolah-olah perbuatan tersebut dilakukan olehnya seorang diri. Secara keseluruhannya, mahkamah mendapati bahawa PK yang bijaksana tidak melakukan apa-apa salah arah dalam keputusannya dan tidak terkhilaf dari segi fakta dan undang-undang dalam membuat keputusan tersebut, oleh itu, sabitan adalah selamat (lihat perenggan 60 & 63).]

Cases referred to

Amri bin Ibrahim & Anor v PP and another appeal [2017] 1 MLJ 1; [2017] 1 CLJ 617, FC (refd)

Andy bin Bagindah v PP [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)

Chan Chwee Kong v PP [1962] MLJ 307; [1962] 1 LNS 22, CA (refd)

Chean Siong Guat v PPr [1969] 2 MLJ 63; [1969] 1 LNS 23 (refd)

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (folld)

Jayaraman & Ors v PP [1982] 2 MLJ 273; [1981] 1 LNS 129 (refd)

Karam Singh v PP [1967] 2 MLJ 25; [1967] 1 LNS 65, FC (refd)

Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)

Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250; [1987] CLJ Rep 221, SC (folld)
Ong Teng For & Anor v PP [2012] 2 MLJ 666; [2013] 1 CLJ 39, CA (refd)
PP v Andal bin Arolla [2013] 7 MLJ 797; [2012] 7 CLJ 77, HC (folld)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116; [1976] 1 LNS 184, FC (refd)
PP v Jitweer Singh a/l Ojagar Singh [2014] 6 MLJ 222; [2014] 1 CLJ 433, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pie bin Chin v Public Prosecutor [1985] 1 MLJ 234 (refd)
Puganeswaran a/l Ganesan & Ors v PP and other appeals [2020] 12 MLJ 165; [2020] 9 CLJ 326, FC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Penal Code s 34

Appeal from: *Pendakwa Raya v Rames a/l Arumugam & Anor* [2020] MLJU 247 (High Court, Kuala Lumpur)

Hafizuddin Salehuddin (with Afifuddin bin Ahmad Hafifi) (Salehuddin Saidin) for the first appellant.
Ayasamy a/l Velu (with Mohamad Naim bin Kamaruddin) (V Samy Renu & Co) for the second appellant.
Zaki Asyraf bin Zubir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] Rames a/l Arumugam ('the first appellant') and Tew Siew Kern ('the second appellant') were charged under s 302, read together with s 34 of the Penal Code for the murder of Sukurnaran a/l Arumugam ('the deceased').

[2] The charge against the first appellant reads:

> Bahawa kamu bersama-sama seorang yang masih bebas, bagi mencapai niat bersama pada tarikh antara 3 April 2017 jam lebih kurang 11.30 malam hingga 4 April 2017 jam lebih kurang 7.15 pagi bertempat di Kebun Kelapa Sawit Lot 358, Batu 38, Jalan Rawang Bestari Jaya, di dalam daerah Kuala Selangor, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh seorang lelaki bernama Sukurnaran A/L Arumugam (No. KP: 830920-10-6143). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] The charge against the second appellant reads:

> Bahawa kamu bersama dengan Rames A/L Arumugam No. KPT 770628-10-5053 yang telah dituduh di Mahkamah Tinggi Shah Alam No. Kes 45B-9-03/2018 bagi mencapai niat bersama pada tarikh antera 3 April 2017 jam lebih kurang 11.30 malam hingga 4 April 2017 jam lebih kurang 7.15 pagi bertempat di Kebun Kelapa Sawit Lot 358, Batu 38, Jalan Rawang Bestari Jaya, di dalam daerah Kuala Selangor, di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh seorang lelaki bernama Sukurnaran A/L Arumugam (No. KP: 830920-10-6143). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun Keseksaan.

[4] The appellants did not plead guilty to the charge, and a joint trial was held before the learned judicial commissioner ('JC').

THE PROSECUTION'S CASE

[5] The prosecution called a total of 17 witnesses, the learned JC had summarised the pertinent facts of the prosecution's case in his grounds of judgment. We respectfully adopt them with some modifications where necessary.

[6] On 3 April 2017, the night of the incident, SP6 was drinking beer with the deceased in front of the deceased's house. At the time, SP6's brother, SP12, stood at the gate of his relative's house, just next to the deceased's house. According to SP6 and SP12, at about 11.30pm, a blue Proton Iswara arrived in front of the house. Two men came out of the car and walked towards the deceased. The two men then attacked the deceased with a parang and knife. The deceased shouted for help as the two men attacked him. The deceased ran to the palm oil plantation in front of the house, and the two men pursued him. After a few minutes, the two men emerged from the plantation and left with their car.

[7] SP6 then went to look for the deceased and shouted his name, but he could not find the deceased. He went to the Batang Berjuntai Police Station, where he informed the police officer of what happened and that the deceased had gone missing. He later led the police to the area where the incident happened.

[8] The police arrived at the scene with their patrol car. SP2, a police officer, stated that he took out a torch light and directed it towards the plantation as guided by SP6. However, he could not see much as the area was dark. The police then left the scene.

[9] On the following morning, ie on 4 April 2017 at about 7.30am, the deceased's body was found by SP3, a neighbour. The police were called to the scene. SP17, the investigating officer, carried out an investigation on the deceased's death. SP9, the deceased's brother, later identified the deceased.

[10] At about 3pm the same day, a post mortem was conducted by SP15, a consultant pathologist at Sungai Buloh Hospital. SP15 gave evidence that the cause of death of the deceased was a 'stab wound to the heart'. Several samples were taken from the deceased's body for analysis.

[11] SP11, the government chemist who analysed the samples, gave evidence that there were traces of alcohol in the blood and urine of the deceased.

[12] Subsequently, the first appellant was arrested. SP6 and SP12 positively identified him during the identification parade. The second appellant was arrested much later, and he was also positively identified by SP6 and SP12 during the identification parade.

FINDINGS OF THE LEARNED JC AT THE CLOSE OF THE PROSECUTION'S CASE

[13] At the close of the prosecution's case, the learned JC found that the prosecution had successfully proven a prima facie case against the appellants as per the charge. As a result, the appellants were ordered to enter their defence.

THE DEFENCES' CASE

[14] The appellants gave evidence on oath. They did not call any other witnesses to testify.

The first appellant's defence

[15] The first appellant gave evidence that he had only met the deceased, whom he knew as 'Kataraja' three times before the day in question. He knew SP6, SP12 and 'Chi Chi' since he was small. He also knew that SP6 and SP12 were siblings and knew them as 'Ammu' and 'Jumbo'.

[16] According to the first appellant, on the night in question, he was with the second appellant, SP12, one 'Chi Chi' whom he had known since he was small, and one 'Omar' at SP12's house. At about 11pm, they decided to go out and eat Bak Kut Teh in Ijok.

[17] The first appellant claimed that as they were about to leave, SP12 received a phone call from SP6. SP12 then informed the first appellant and the

others that SP12's brother, SP6, had a quarrel with the deceased, and the deceased had taken SP6's motorcycle away. SP6 had also requested SP12 to come and pick him up. SP12 requested help from the first appellant and the others, and soon after that, they all went to the deceased's house in two separate cars, a Honda and a Proton Iswara.

[18] According to the first appellant, when they arrived at the deceased's house, the second appellant came out from the Proton Iswara and slashed the deceased. The first appellant claimed not to have a clear view of the incident as he was seated at the back of the other car. However, he claimed to have seen the second appellant chasing the deceased into the oil palm plantation. He followed them to stop the second appellant from fighting with the deceased.

[19] The first appellant stated that the plantation area was dark, and they could not find the deceased. After a brief moment, the first appellant and the others left the plantation and the area with the same car they had arrived with.

[20] The first appellant denied having any knowledge of what happened to the deceased. He also denied having killed, slashed or bashed the deceased. The first appellant denied carrying any weapons at the scene or using any weapon against the deceased.

The second appellant's defence

[21] The second appellant gave evidence that SP6, SP12, the first appellant and the deceased are his friends since they were small. He also knew 'Murugan'/'Omar' for 19 years.

[22] According to the second appellant, on the day in question, he and four others left Murugan's house to have Bak Kut Teh when SP12 received a phone call from his brother, SP6. After the call, SP12 told them they should visit his brother before going for their meal. The second appellant and Murugan went with the Proton Iswara, whereas the first appellant, Chi Chi and SP12, went with the Honda.

[23] The second appellant claimed that SP6 and the deceased were seen drinking when they arrived at the scene. He then saw the Honda approaching the said house. According to the second appellant, he could not see clearly what happened, but he saw the deceased running away, and the first appellant was chasing the deceased while holding a parang. The second appellant said he quickly went after the first appellant to stop him and pulled the first appellant away from the area. He did not know which way the deceased ran or whether the deceased was hiding or had run away from the plantation. He then asked the first appellant to leave the area, and they left afterward.

[24] The second appellant denied that he was the one who had slashed the deceased. He also denied that the first appellant was the one who tried to stop him and who had pulled him away from the area.

[25] The second appellant also denied bringing with him a parang that night and that he had used that parang to slash the deceased. He denied chasing the deceased with the first appellant into the plantation. He denied knowing what happened to the deceased or that he had killed the deceased that night.

FINDINGS OF THE LEARNED JC AT THE CONCLUSION OF THE TRIAL

[26] At the conclusion of the trial, the learned JC found that the appellants had failed to raise any reasonable doubt to the prosecution's case and that the prosecution had successfully proven their case against the appellants beyond a reasonable doubt. Thus, the appellants were found guilty and convicted of the charge against them. Consequently, the appellants were sentenced to death.

THE APPEALS

[27] Aggrieved with the decision of the learned JC, the appellants filed their respective appeals, which were set for hearing before us. After carefully perusing the appeal records and hearing all parties to these appeals, we unanimously decided that the appellants' conviction was safe and affirmed the decision of the learned JC with regard to the appellants' conviction and sentence. Below are our reasons for holding so.

ISSUES

[28] In this appeal, the issues raised by the appellants can be summarised as follows, namely whether the learned JC had erred, both in fact and in law, when he failed:

(a) to consider that there were material discrepancies in the evidence of SP6 and SP12, which undermined their credibility;

(b) to draw an adverse inference against the prosecution for failing to call Chi Chi and Murugan/Omar to give evidence;

(c) to consider that the investigation conducted by the investigating officer was shoddy and that the evidence adduced in its totality did not lead to the only irresistible conclusion of the appellants' guilt; and

(d) there was no evidence of common intention between the appellants to murder the deceased.

First issue: Credibility of SP6 and SP12

[29] The appellants submitted that the learned JC had erred, both in fact and in law, when he failed to consider that there were material discrepancies in the evidence of SP6 and SP12.

[30] The appellants highlighted the discrepancies in the evidence of SP6 and SP12 as follows.

[31] SP6 testified that he was having several cans of Kingfisher beer with the deceased on the night of the incident. He was sitting on his motorcycle while the deceased stood near him, holding the handle. Suddenly, the blue Proton Iswara arrived. SP6 identified both the appellants who came out from the car. SP6 claimed to have seen the appellants carrying sharp objects, which he described as 'parang' and 'pisau' (knife). Then he saw the second appellant slashing the deceased on his back while the first appellant stood near the car. The deceased then ran towards the plantation, and both the appellants gave chase.

[32] On the other hand, SP12 gave evidence that at the material time, he was in front of his relative's house, which was next to the deceased's house. SP12 stated that while he was at the gate, he saw the blue Proton Iswara stop by, and the appellants, whom he knew, came out from the car. He then saw the first appellant slashing the deceased on his back. He did not see the second appellant carrying any weapons on him. SP12 claimed to have seen both the appellants chasing the deceased into the plantation.

[33] The learned JC was aware of these discrepancies as the appellants had raised the same issue during the trial below.

[34] In addressing this issue, the learned JC first analysed the demeanour of SP6 and SP12 while giving evidence. This is the audiovisual advantage the learned JC had as the trial judge, which this court did not have. After carefully analysing their demeanours, the learned JC found that SP6 and SP12 were truthful witnesses, despite the discrepancies in their evidence.

[35] The learned JC recorded the reasons for his findings in the grounds of judgment, which is reproduced below:

> [16] *This court carefully examined the demeanour of both witnesses*. It Is a finding of this court *that both the witnesses were familiar with each other and recognised the accused persons*. They grew up in the same neighbourhood and were acquaintances. It is commonly accepted that recognition is more reliable than identification. It was no surprise that both the witnesses could positively identify the accused persons at the identification parade.
>
> [17] *When SP6 testified, he was a nervous witness. This was to be expected given the solemness of the occasion. Furthermore, the deceased was his friend and the accused*

persons were also known to him. It was daunting enough an experience for him or for any one in his position. *However, he was fluent in his narration of the events especially the sequence of events that transpired that night. He was firm that the two accused persons carried weapons that fateful night. He was not shaken during the challenge by counsel*.

[18] After OKT2 was charged, counsel for OKT2 requested *SP6 to be recalled for cross examination*. This was done on 30 May 2019 after a lapse of *almost eight months since he last appeared in court* on 24 September 2018. Despite the long lapse of time, *he was consistent with his story. He appeared nervous nevertheless and was unsure why he had to be recalled. This was an acid test of his credibility. He nevertheless, passed it*.

[19] SP12 on the other hand, was the elder brother ofSP6. *He too was a nervous witness and his demeanour in court was similar to his brother SP6*. They were in the same dilemma of knowing both the deceased and the accused persons. SP12 was also firm in his rendition of the events that took place that night. *He was firm in testifying that he saw OKT1 attack the deceased before chasing the deceased into the plantation*.

[36] The learned JC went on to say:

[22] *Discrepancies there will always be, especially when the rendition of evidence is one that involves the recollection of sudden and abrupt events*. The considerations that a court must take into account when assessing the testimony of a witness is never finite. *Examples include location of the incident, the distance a witness is from the impugned act, the age, the strength and frailty of a witness to name a few, must all be factored in*. In cases where events occurred several years before the trial commenced, consideration must be made on the ability of witnesses to recall as some witnesses can recall events better than others. Failure to do so should not automatically render the witness unreliable.

[23] *It is trite that discrepancies in a witness testimony does not right away make him an unreliable witness and make the whole of his evidence unacceptable* (see *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172; [1981] 1 LNS 200, *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63; [1969] 1 LNS 23, *Public Prosecutor v Dato' Harun Idris* [1979] 1 MLJ 15).

[24] *From the assessment of this court, the witnesses were narrating what they saw. This was evident from their steadfastness in narrating the events that transpired that night. This was despite the fact that they were questioned repeatedly by counsel for both accused persons. There was no reason to label them as unreliable. The credibility of the two witnesses were intact. This court finds no reason to reject their testimony*.

[37] The approach taken by the learned JC was consistent with long-established authorities such as *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 184 (FC), *Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165; [2020] 9 CLJ 326 (FC), *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 (HC) and *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234 (HC).

[38] Secondly, the learned JC had also considered whether the discrepancies in their evidence were material to strike at the very root of the charge. This is also in line with what has been established by the Federal Court through His Lordship Raus Sharif PCA (as he then was) in *Ong Teng For & Anor v Public Prosecutor* [2012] 2 MLJ 666; [2013] 1 CLJ 39, who cited the case of *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289 with approval as follows:

> [33] It is settled law that the credibility of a particular witness and the weight to be given to his other evidence is manifestly within the province of a trial judge. In *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289, Shaik Daud JCA said that:
>
> > *There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings*.
>
> [34] Further, in *Public Prosecutor v Dato' Harun Idris* [1979] 1 MLJ 15; [1976] 1 LNS 184, Raja Allan Shah FJ (as His Royal Highness then was) said:
>
> > In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinized each evidence very carefully as this involves the question of weight to be given to certain evidence in a particular circumstances.
>
> [35] In the final determination of issues, *it is incumbent on the trial court to decide, having regard to the probabilities of the case and based on contemporaneous facts and documents, whether the witnesses or set of witnesses are speaking the truth on matters of central importance*.

[39] In the present case, the learned JC found that the discrepancies in the evidence of SP6 and SP12 were not material. The learned JC stated that regardless of the contradictory narration of events, he had accepted the crucial evidence by SP6 and SP12, which remained consistent, that the deceased was

confronted by the appellants and as a result of their actions, the deceased tried to save himself by running into the plantation while the appellants gave chase. The following can be seen in the learned JC's grounds of judgment:

> [45] It is the finding of this court that the discrepancy of the evidence between SP6 and SP12 *did not affect the prosecution case. The discrepancy relates to the incident which was a precursor to the murder of the deceased. The narration of events albeit contradictory, did point the important fact that the deceased was confronted by the two accused persons. As a result of the acts of the two accused persons, the deceased tried to save himself by running into the plantation*.
>
> [46] Even if this court were to disregard who slashed the deceased, *it does not alter the fact that the deceased ran into the plantation with the two accused persons in pursuit of him*.

[40] In a nutshell, the learned JC was well aware of the discrepancies in the evidence of SP6 and SP12. Yet, for the above reasons, he found that the discrepancies were not material and that SP6 and SP12 were truthful witnesses. The learned JC had also accepted the crucial part of their evidence which was consistent and remained unchallenged.

[41] This approach is consistent with what has been decided by the Federal Court in *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1, as can be seen in the following words:

> [9] The approach to be taken by an appellate court when dealing with a trial court's assessment of credibility of witness is well-established by high authorities. The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. *In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject* (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; [1969] 1 LNS 52 (FC), *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101 (FC), *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; [1980] 1 LNS 197 (FC), *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 CLJ 780 (CA). It is not the function of an appellate court to make primary findings of facts (see *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ 457 (FC)).
>
> [10] Thus, applying the above principles to the facts of this case, it is clear that the learned judicial commissioner was alive to the fact that there were contradictions and discrepancies in the evidence of SP7 and nevertheless held that SP7 was a witness of truth. He ruled that the *discrepancies were insufficient to destroy SP7's credibility on the issue of identificatio*n ...

[42] We, therefore, conclude that the challenge mounted by the appellants against the credibility of SP6 and SP12 is without merit. In our judgment, the credibility of SP6's and SP12's evidence was decided wholly on the facts and the prevailing circumstances of the case by the learned JC, who had the audio-visual advantage reserved for the trial court. We have no reason to disagree with the learned JC's findings on SP6 and SP12's credibility. We also see no reason to disturb the findings of fact arrived by the learned JC that the discrepancies in their evidence were not material and were insufficient to affect their credibility.

Second issue: Adverse inference under s 114(g) of the Evidence Act 1950

[43] On this issue, the appellants submitted that the learned JC erred both in fact and in law when he failed to draw an adverse inference against the prosecution for their failure to produce Chi Chi and Omar/Murugan as a witness.

[44] First and foremost, s 114(g) of the Evidence Act 1950 reads:

> Section 114 Court may presume existence of certain fact.
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> ...
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

[45] Concerning the application of s 114(g) of the EA 1950, we are primarily guided by the decision of the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250; [1987] CLJ Rep 221, where His Lordship Mohd Azmi SCJ (as he then was) in delivering the judgment of the court held:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration *can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence*. It may be drawn from withholding not just any document, but material document by a party in his possession, or *for non-production of not just any witness but an important and material witness to the case*.

[46] His Lordship Hasan Lah FCJ (as he then was) in delivering the

judgment of the Federal Court in *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617 held as follows:

> [56] The issue of the non-calling of Phee Chin Guan was argued before the Court of Appeal by the defence. *The Court of Appeal held inter alia that Phee Chin Guan was not an essential or material witness to the prosecution in order to establish a prima facie case at the close of its case or to prove its case beyond reasonable doubt at the end of the defence case and the non-calling of Phee Chin Guan did not leave a gap in the prosecutions case*. It was also held that on the facts of the case, the learned trial judge did not err in not invoking s 114(g) of the Evidence Act 1950 against the prosecution.
>
> [57] The power of the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 is discretionary. It depends on the circumstances of the case and particularly in cases where the material witnesses are not produced (see *Lau Song Seng v Public Prosecutor* [1998] 1 SLR 663. The scope of s 114(g) has been explained by the Supreme Court in *Munusamy Vengadasalam v Public Prosecutor* [1987] 1 MLJ 492 at p 494; [1987] 1 CLJ 250; [1987] CLJ Rep 221 at p 223
>
> > ... It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.
>
> [58] *On the facts of the case we agree with the finding of the Court of Appeal that adverse inference under s 114(g) of the Evidence Act ought not to be drawn against the prosecution for not calling Phee Chin Guan as its witness. We agree with the reasons given by the Court of Appeal.*

[47] In the present case, we agree with the learned JC that Chi Chi and Murugan/Omar were not essential or material witnesses for the prosecution to establish their case against the appellants. The prosecution had already called two eyewitnesses who had testified on what have transpired on the night in question. SP6 was the nearest person to the deceased, and SP12 was standing outside his relative's house next to the deceased's house. Therefore, the non-calling of Chi Chi and Murugan/Omar did not leave any gap in the prosecution's case. There was also no evidence to suggest that the prosecution had suppressed or withheld Chi Chi's and Murugan/Omar's evidence from the defence.

[48] Therefore, we agree with the learned JC that on the facts of this case, adverse inference under s 114(g) of the Evidence Act 1950 should not be drawn against the prosecution. Hence, we found this issue to be devoid of merits.

Third issue: Whether circumstantial evidence points to the only irresistible conclusion that the appellants had murdered the deceased

[49] At the outset, it is pertinent to note that the prosecution's case against the appellants is substantially based on circumstantial evidence. No eyewitnesses saw who inflicted the fatal injury to the deceased, leading to his death.

[50] His Lordship Thomson CJ (as he then was) in *Chan Chwee Kong v Public Prosecutor* [1962] MLJ 307; [1962] 1 LNS 22 (CA) had succinctly explained the principles applicable in cases where the evidence was entirely circumstantial in the following words:

> In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. *It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?*

[51] The passage was cited with approval by the Federal Court in *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appea* [2009] 3 MLJ 643; [2009] 2 CLJ 603 (FC), *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 (FC), *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 (FC), and *Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2014] 1 CLJ 433 (FC).

[52] His Lordship Ong Hock Thye FCJ (as he then was) in *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65 (FC) held as follows:

> ... In a case where the prosecution relies on circumstantial evidence, *such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused* ... (See also: *Muniandy & Anor v. Public Prosecutor* [1973] 1 MLJ 179; [1973] 1 LNS 92, *Kamis v Public Prosecutor* [1975] 1 MLJ 461; [1974] 1 LNS 59, *Lim Foo Yong v Public Prosecutor* [1976] 2 MLJ 259; [1976] 1 LNS 62 and *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ 101 Rep; [1983] 2 CLJ 10).

[53] Similarly, in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273; [1981] 1 LNS 129 (FC), His Lordship Syed Othman FCJ (as he then was) held:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Me Greevy v Director of Public Prosecution* where it was argued at p 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, *it is the duty of the trial judge, in addition to giving the usual direction that*

the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

[54] In the present case, other than the issue of SP6 and SP12's credibility and the non-invocation of an adverse inference against the prosecution, which has already been discussed above, the appellants submitted that the investigating officer had conducted a shoddy investigation since the blue Proton Iswara and the murder weapon were never recovered by the police. As a result, the appellants submitted that the circumstantial evidence led by the prosecution was insufficient to sustain their conviction.

[55] However, we disagree with the appellants for the following reasons.

[56] Firstly, SP6 and SP12 confirmed that the appellants used sharp weapons, such as parang or knife, when they attacked the deceased from behind. This is consistent with the marks of injury noted by the consultant pathologist, SP15, when he conducted the post mortem on the deceased's body. The appellants were also seen to have pursued the deceased into the plantation while still holding the weapon.

[57] Therefore, we disagree with the appellants that the non-recovery of the murder weapon had any effect on the prosecution's case. We agree with His Lordship Abdul Rahman Sebli J (now CJ Sabah and Sarawak) in *Public Prosecutor v Andal bin Arolla* [2013] 7 MLJ 797; [2012] 7 CLJ 77, who opined as follows:

> The murder weapon was never recovered but this should not affect the prosecution's case. The evidence is incontrovertible that a knife was used in the attack and this is amply corroborated by independent forensic evidence. The accused was accordingly called upon to state his defence to the charge.

[58] In the present case, the circumstantial evidence adduced by the prosecution showed that:

(a) while SP6 was drinking beer with the deceased at his house, a blue Proton Iswara arrived, and both the first and second appellants were identified to have come out from the car;

(b) the first and second appellants were seen attacking the deceased from behind by using sharp weapons such as parang or knife;

(c) this is consistent with the evidence of the consultant pathologist, SP15, who confirmed that the deceased sustained injuries to the left shoulder, neck and back predominantly from sharp object or weapon;

(d) however, the deceased did not die from those injuries;

(e) according to SP15, the stab wound to the deceased's epigastrium from the front to the back, which penetrated the deceased's heart, was fatal in nature and had caused the deceased's death;

(f) there was no evidence to suggest that the fatal injury was inflicted before the relevant eyewitnesses;

(g) after being slashed from behind, the deceased ran towards the plantation. The appellants were seen pursuing the deceased into the plantation while still holding the weapon;

(h) after a few minutes, the appellants came out from the plantation and left in the same car that they arrived with;

(i) the deceased never came out from the plantation;

(j) SP6 then went to look for the deceased and shouted his name, but there was no answer, and he could not find the deceased;

(k) SP6 went to the police station and went back to the scene to look for the deceased, but to no avail since the area was dark; and

(l) the deceased was found the following morning by SP3 inside the plantation.

[59] In our view, all of the circumstantial evidence adduced by the prosecution above pointed to the irresistible conclusion that the appellants were the ones who had inflicted the fatal injury to the deceased, causing his death. Based on the evidence, we do not see any other possible explanation other than the appellants' guilt.

[60] It can also be inferred from the circumstances of the case and the conduct of the appellants mentioned above that the criminal act of murder was done in furtherance of their common intention, regardless of who amongst the first or second appellant had delivered the fatal injury to the deceased. Therefore, liability for the crime may be imposed on any one of the appellants in the same manner as if the act were done by him alone.

[61] We are guided by the Federal Court in *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769 (FC), where the generally accepted principles on the operation of s 34 of the Penal Code was outlined as follows:

[48] At this juncture, it is convenient first to address the generally accepted principles of the operation of s 34. The position in respect of these elements is fairly uncontroversial, and the relevant principles gleaned from the authorities in Malaysia, Singapore and India can be briefly dealt with.

[49] It is widely acknowledged that *s 34 is a rule of evidence which embodies the common sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually (Krishna Rao Gurumurthi v Public Prosecutor & Anor Appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603).

[50] *If it is shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone* (*Mahbub Shah v Emperor* [1945] 2 MLJ 144).

[51] The provision is *intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.(Hari Ram v State of Uttar Pradesh* [2004] 8 SCC 146). *In those circumstances, the law makes no distinction between them or between the parts played by them in doing the criminal act* (*Bashir v State* AIR 1953 All 668).

[52] Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence *(Sabarudin Non v Public Prosecutor & Other Appeals* [2005] 4 MLJ 37; [2005] 1 CLJ 466 *and Manikumar Sinnappan & Ors v Public Prosecutor* [2017] 3 CLJ 505; [2012] MLJU 1754; [2015] 1 LNS 1344; [2016] 2 MLRA 1).

[53] Common intention, distinguished from the same or similar intention, requires proof that the criminal act was done in pursuance of a pre-arranged plan (*Mahbub Shah*). *Such pre-planning may develop on the spot or in the course of the commission of an offence, the crucial test being the plan must precede the commission of the offence* (*Namasiyiam Doraisamy v Public Prosecutor & Other Cases* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ Rep 241).

[54] A common intention may often be difficult to prove by way of direct evidence in practice, but it *can be inferred from the circumstances of the case and the conduct of the accused* (*Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101).

[62] For the reasons mentioned above, we conclude that the overall circumstantial evidence adduced by the prosecution points to the only irresistible conclusion that the appellants had committed the offence as per the charge. We found no merit in the appellants' submission on this issue.

CONCLUSION

[63] In conclusion, after carefully perusing the appeal records and hearing all parties' submissions, we have unanimously decided that the learned JC committed no misdirection in his decision. We also found that the learned JC did not err in fact and law in arriving at the said decision, and we see no reason

to disturb the same. We are also of the view that the conviction against the appellants is safe. Accordingly, the first and second appellants' appeals are dismissed, and the learned JC's decision is hereby affirmed.

Appeals dismissed; decision of learned JC affirmed.

Reported by Dzulqarnain Ab Fatar